No. [redacted] 97

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1942

WEST VIRGINIA GLASS SPECIALTY COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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West Virginia Glass Specialty Company, Petitioner in the above styled proceeding, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fourth Circuit entered in said proceeding on March 25, 1943, whereby said last named Court enforced the order of the National Labor Relations Board against Petitioner issued on September 12, 1942, and ordered that Petitioner abide by and perform the directions of said order.[1]

[1]Pursuant to a stipulation of the parties contained in the printed supplement the record for the purpose of this petition for writ of certiorari consists of the following:

(1) A volume entitled Petitioner's Appendix which contains those portions of the record printed by the West Virginia Glass Specialty Company as an appendix to its brief heretofore filed in the United States Circuit Court of Appeals for the Fourth Circuit, referred to as "P. A."

(2) A volume entitled Board's Appendix printed by the National Labor Relations Board as an appendix to its brief heretofore

Opinion Below

The opinion of the Circuit Court of Appeals is reported in 134 F. 2d 551. The findings of fact, conclusions of law and order of the Board (P. A. 1-28) are reported in 43 N. L. R. B. No. 206.[2]

Jurisdiction

The decree of the Circuit Court of Appeals was entered on March 25, 1943. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of Febuary 13, 1935, and under Section 10(e) and (f) of the National Labor Relations Act (hereinafter called the Act).

Questions Presented

1. Did Petitioner dominate or interfere with the formation or administration of Independent Glass Decorators Union of West Virginia, hereinafter referred to as "Local 1," or Branch 1 or Branch 2 thereof, or contribute financial or other support to them, or either of them, in violation of Section 8 (2) of the Act?

2. Did Petitioner interfere with, restrain or coerce its employees in the exercise of the rights guaranteed by Sec-

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filed in the United States Circuit Court of Appeals for the Fourth Circuit, referred to as "B. A."

(3) A printed supplement consisting of the opinion and order of the United States Circuit Court of Appeals for the Fourth Circuit dated March 25, 1943.

(4) Said stipulation of the parties as to the record.

The typewritten transcript of the evidence is referred to as "Tr.," the Board's Exhibits filed with the evidence as "Ex.," and the Trial Examiner's Report as "Exam. Rep."

[2]This is a pamphlet copy of the decision and order issued in advance of the bound volume It is available in the library of this Court.

tion 7 of the Act, and thereby violate Section 8 (1) of the Act?

3. Was Petitioner guilty of unfair labor practices tending to lead to labor disputes burdening or obstructing commerce or the free flow of commerce, within the meaning of Section 2 (6 and 7) of the Act?

Action of Lower Court on Questions Presented

1. The lower Court confined itself exclusively to a consideration of the sufficiency of the evidence to support the findings of the Board from the standpoint of the substantiality of such evidence, whereas Petitioner's attack upon said findings was based upon various other material grounds fairly and fully presented by brief and in argument;

2. By its pronouncement that it is powerless to inquire "whether the findings of the Board are so clearly erroneous that an injustice has been done," the lower Court commits itself to a doctrine repugnant to American conceptions of justice and right.

3. Subjoined there is an enumeration of the several salient features of the case made by Petitioner of which the lower Court took no cognizance:

(a) The lower Court's opinion ignores the fact, as indubitably shown by the record, that no one alleged to have been addressed by officials of Petitioner was in the slightest degree influenced by endeavors claimed to have been put forth by such officials "to prevail upon working employees and upon strikers to give up membership in the Flint and to join the Independent;"

(b) The lower Court's opinion discloses that the Court took no cognizance whatever of the fact that Petitioner's

antecedent labor record was unimpeachable and that Petitioner had exhausted every resource at its command to bargain with the Flints and obtain wage concessions sufficient to enable Petitioner to survive;

(c) The lower Court failed to take cognizance of the fact that the record is free from all trace of coercive action or compulsion by or for Petitioner to induce its employees to desert the Flints and join with the Independent;

(d) The lower Court disregarded the fact that Petitioner did not make it a condition of initial employment or retention of employment that any person in its service affiliate with or refrain from affiliation with any particular labor organization whatever;

(e) The lower Court recognized and accorded full credence to the theory that Petitioner "gave its aid and support to the Independent in its social activities for the entertainment of the workers," when such theory was concededly without appreciable evidence to support it;

(f) Notwithstanding the prevailing tendency of tolerating breaches of wage contracts and the attendant practice of treating such contracts as unenforcible if repudiated by the workers, the lower Court in its opinion condems the working agreements between Petitioner and the Independent and its branches because such agreements "did not regulate the wages;"

(g) The lower Court in its opinion failed to give any weight to the fact that among all of Petitioner's 248 employees not one appeared to question or protest against the adequacy of his wages or any of the other conditions of his employment;

(h) The lower Court's decision runs counter to the uncontrovertable showing of the record that an overwhelm-

ing majority of Petitioner's workers regard, and since May 15, 1941, have unreservedly accepted the Independent and its branches to which they adhere as satisfactory bargaining agents;

(i) The lower Court failed to deal with this case as one in which the Board by its complaint became the aggressive sponsor of a charge conceived, made and persistently urged by the Flints and which charge said Board sought to sustain by recourse to the powerful instrumentalities with which it is armed;

(j) The lower Court treats as sufficient and substantial the evidence supporting the Board's findings, although with the burden resting on it to prove certain material facts, the Board failed to produce available, important and necessary witnesses to establish such facts;

(k) Contrary to the holdings to be found in the adjudicated cases on the subject, the lower Court held Petitioner to strict accountability for each and every isolated utterance attributed by Flints witnesses to certain of its officials, although the testimony as to such utterances was denied by the officers concerned, and such utterances were invariably treated as violative of the Act;

(l) That there was a prompt recognition of the Independent as the bargaining agent for the group it represented and a like expeditious recognition in the order of their formation of Branches 1 and 2 thereof as the bargaining agents for the respective groups represented by them, does not, as the lower Court's opinion implies, denote company domination of or interference with any of these unions;

(m) At odds with the holdings in analagous cases, the lower Court's position, as expressed in the opinion, is that it is powerless to disturb the Board's finding because

the arguments arrayed against it were such as might be accepted as valid and capable of consideration only where a "finding by a judge sitting without a jury in a case at law" was involved;

(n) By its decision herein the lower Court in effect sustained the unjustified mass rejection of all testimony of Petitioner's officials in every instance in which it clashed in any respect with the testimony of Flints member witnesses;

Statute Involved

The pertinent provisions of the Act are set out in the Appendix.

Statement

The order of the Board under consideration here directs disestablishment of the Independent and Branches 1 and 2 thereof. A brief review of the history of the controversy is indispensable to a proper perspective and a full appreciation of the absence of justification for the Board's action.

1. *Early History of Petitioner's Operations.*

In 1929 the Petitioner began operations at its plant and continuously engaged in the manufacture of certain types of glassware until Febuary 26, 1940, when it voluntarily shut down as hereinafter set forth. In March, 1930, Local 76 (skilled workers) of the American Flint Glass Workers Union of North America ("Flints") was organized at Weston, and subsequently Branch 527 (miscellaneous employees) of the Flints and Branch 520 (decorators) of the

Flints were organized, and the Petitioner recognized and dealt with the Flints as an exclusive bargaining agent until the strike of March 4, 1940. (Exs. 2 and 3, Sec. 2; Tr. John Weber, Jr., 785.) The Petitioner was a member of the National Association of Manufacturers of Pressed and Blown Glassware (herein sometimes referred to as the "Association") for several years prior to the summer of 1939, and, as Petitioner's representative, John Weber, Sr., attended the conference between the Association delegates and Flint representatives in the years 1937 to 1939, inclusive. (Ex. 3, Secs. 2, 5 and 6; Tr. 844.)

In 1936 the Petitioner had an operating profit of $25,040.59, which dropped to $5,559.86 in 1937, due to competition from abroad, the incidence of numerous cooperative plants and the widespread supplanting of hand-blown products by machine ware. In 1938 Petitioner sustained an operating loss of $16,550.32, and in 1939 an operating loss of $43,476.73 occasioned by the same competition, which the Petitioner was unable to meet because of the prohibitive wage scale in effect in its hand-operated plant. Prior to the year 1939, the Petitioner had protested against the rates of pay established at the last previous annual conference of the Association and the Flints, asserting in justification of its position that the existing market conditions, foreign competition and the competition of small cooperative glass factories, as well as the mechanization of the plants of other large glassware manufacturers, were such that it could no longer pay the wage scale adopted at the conference. It was the practice for the conference to negotiate a wage scale for the ensuing year, and when adopted, this master agreement prescribed for its limited duration a uniform wage scale and other uniform working conditions applicable to employees in the plants of all the Association members. Specifically these agreements ex-

tended from September 1st of each year until August 31st of the following year. The Petitioner had advised the Flints of its failing financial condition due to the causes above referred to and which were beyond its control and had petitioned for a review of the situation and requested a reduction in wage rates for its plant. However, at the annual conference of the Association and the Flints at Atlantic City in the summer of 1939, the proposal for the reduction of labor rates was voted down by the conference, whereupon John Weber, Sr., representing the Petitioner, advised the conference that the Petitioner would no longer participate in its deliberations and tendered Petitioner's resignation from the Association, and from that time the Petitioner has not been a member of the Association or been identified in any way with its affairs, nor has it been represented at any recurring annual conference. (Ex. 3, Secs. 3 to 6; Tr. John Weber, Jr., 787-790, 792-801, 845; John Weber, Sr., 888-905, 979-984; Howell 987-990.)

On September 1, 1939, the new wage agreement adopted in the Association conference at Atlantic City went into effect. Having no alternative, the Petitioner continued to pay its then prevailing wage scale (which incidentally was the same in effect both for the year 1938-1939 and for the year 1939-1940 as applied to the line of glassware manufactured by the Petitioner) until February 26, 1940. However, this is unimportant in the present controversy, as the attorney for the Board quite frankly stated at the hearing of this case that whether or not the Petitioner could or should have continued negotiations with the Flints after its withdrawal from the conference and from membership in the Association was a matter outside the scope of the hearing. (Ex. 3, Sec. 7; Tr. 1231.)

It developed at the hearing that competition from machine plants had greatly aggravated the already precar-

ious situation in which the hand-blown branch of the glassware industry was placed. Volume output, accomplished with automatic machines in the operation of which almost no skilled labor is required, had permitted the products of those plants to be sold at prices much below the cost at which the hand-blown plants could put comparable articles on the market. Not having to reckon to any measurable extent with labor costs, the owners of the machine plants regarded the demands of labor in the hand-blown field with the utmost indulgence. They apparently reasoned that in proportion as wages in that field advanced the difficulties of their competitors were multiplied to the improvement of the machine plants' competitive position. Thus the operators of the hand-blown plants received nothing more than nominal support in their efforts to procure adoption of a wage scale which would permit their factories to operate profitably. Such was the atmosphere in which the annual wage-making conferences were held. Finding his endeavors to obtain relief by a reasonable downward revision of the wage scale completely rebuffed, it is not difficult to understand why, as the representative of Petitioner, Weber, Sr., withdrew from the 1939 Atlantic City conference and his company thereupon ceased to be a member of the Association.

2. *Conferences Looking to Wage Readjustment.*

Between September 1, 1939, and January 29, 1940, numerous conferences were held between officials of the Petitioner and committee of the Flints for consideration of a wage scale adjustment, during all of which the Petitioner repeatedly insisted that because its operations were resulting in an unbroken series of substantial losses, it could not survive under the then existing scale. That such was in fact the case, is disclosed by Petitioner's financial statements referred to in the testimony of its auditor,

Harry R. Howell, a certified public accountant. (Ex. 3, Sec. 8; Tr. 985-990.)

On January 29, 1940, the Petitioner addressed a letter to M. J. Gillooly, then President of the Flints, and on February 12, 1940, after receiving no reply to said letter, the Petitioner again wrote the Flints. These letters set forth the Petitioner's mounting losses and appealed to the Flints for relief to the end that the Petitioner could continue to give steady employment to the workers. Attention was thereby called to the fact that the stockholders and officials of the Petitioner working in the factory had voluntarily taken a 70% cut in their compensation which was done to reduce the overhead to the lowest minimum. The letters also mentioned the type of competition which was ruining the Petitioner's business and set forth fully the reductions in wages which were necessary and must be made in order to keep the plant in operation. The Flints utterly ignored these pleas for relief and, so far as the record discloses, made no effort to arrange a conference between the Flints and the representatives of the Petitioner to discuss the situation until the notice of February 19, 1940, hereinafter set forth, was posted. (Exs. 3-A and 3-B.)

On February 19, 1940, the Petitioner posted in the plant a notice of wage reduction. (Ex. 3-C; Tr. 927-928.) Between that date and February 24th various officials of the Petitioner engaged in conferences with the Flints' committee at the plant office and again advised the committee that the plant would not operate after February 24th except on a reduced wage scale as stated in said notice. As a result of a telephone conversation between President Gillooly of the Flints and representatives of the Petitioner, the Petitioner voluntarily shut down its plant on February 26th for one week for the purpose of attempting to find a solution to the wage question. On February 27th both the

Petitioner and representatives of the Flints held conferences at Pittsburgh, Pennsylvania, but no solution of the problem was evolved. (Ex. 3, Secs. 11 to 13.) On Sunday, March 3, 1940, representatives of Local 76 and of Branch 520 and Branch 527 advised representatives of the Petitioner that they would not accept the wage reductions. (Armstrong, Chairman of Local 76, P. A. 93; Simons, Chairman of Committee of Branch 527 and Spokesman, Tr. 1123-1126.)

3. Events Occurring after Reopening of the Plant on March 4, 1940.

On March 4, 1940, Petitioner reopened its plant, but operations were continued on a reduced scale because of the failure of a number of employees to return to work. Limited operations continued until March 28, 1940, when Petitioner again closed its plant, with the exception of the decorating department, which continued to operate. On May 15, 1940, Petitioner reopened its plant and operations in all departments have been maintained uninterruptedly from that time to the present. (Ex. 3, Secs. 14 to 16.)

Conferences between March 4, 1940, and May 5, 1940.

There is much dispute as to the purport of interlocutions occurring at the various meetings between representatives of Petitioner and representatives of the Flints. Want of space does not permit here recounting in detail the events of these meetings. The gist of the Flints' claim is that in the course thereof the conferees representing the Petitioner made remarks derogatory of the Flints and made proposals for an adjustment of the then pending controversies which were contrary to practices tolerated by Flints' leadership and inimical to that organization's established policies. Voluminous testimony as to the utterances

of those participating in these conferences was placed in the record by the Board, its theory doubtless being that such utterances might be construed to reflect an attitude of inherent hostility on the part of Petitioner's management toward the Flints, and a manifest desire to escape from Flint domination. In the main, the versions of the Flint representatives are denied by Petitioner's representatives present at the conferences. Moreover, certain of the Flints' representatives find themselves in the position of making statements for which corroboration from their associates is wanting and of having given testimony under oath at a hearing in another case in which like matters were involved and of having failed to attribute to Petitioner's representatives any conduct evincing hostility to the Flints or a desire to uproot that organization. To say the least, this must be regarded as inexplicable. In his report, the Examiner refrained from all reference to the glaring discrepancies to be found in the testimony of Flint members concerned. Whatever those connected with the Petitioner's management may have said or suggested to Flint conferees as a way out of what was developing into a hopeless stalemate, it all fell on deaf ears.

No member of the Flints participating in the deliberations was perceptibly impressed or moved.

The evidence goes no further than to point to a *bona-fide* effort by those charged with the protection of the Petitioner's interests to deal with the Flints upon equitable terms by observance of which the Petitioner might be enabled to emerge from a period of calamitous operating deficits which had long persisted.

Aside from the incredible and absurd account given by Board's witness, "Pop-eye" Goodwin, of an incident, the date of the occurrence of which he cannot approximate any

closer than to say that it was in the Spring or the Summer or the Fall of 1939 (P. A. 58, 61), the record does not disclose any evidence whatever of previous antagonism to the Union from Petitioner's officials.

This past consistent regard for and recognition of the legitimate rights of labor must be carefully weighed in determining the probable course of conduct of parties when new and unforseen conditions arise. Sensible men do not lightly cast off impulses, convictions or practices founded on a lifetime of experience.[3]

In effect, both Examiner and Board find no fault with the labor record or reputation of the Petitioner's officials but wherever those who appeared as witnesses are in conflict with Flints witnesses the statements of these officials are condemned and rejected almost without exception and the testimony of Flints witnesses unqualifiedly approved and accepted.

In the case of Weber, Sr., the Examiner says that he was not impressed with Weber, Sr.'s, reliability as a witness. No more cogent or substantial reason for wholesale rejection of the testimony on Petitioner's behalf is advanced by Examiner or Board.

Formation of Local 1—(Independent Union).

To detail what procedure was followed in organizing Local 1, the decorators' union (Independent Glass Decorators Union of West Virginia), Frank Coslick was intro-

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[3]The courts approve this doctrine in criminal cases in West Virginia by sanction of instructions to juries to the effect that evidence of good character, taken in connection with the other evidence in such cases, may be sufficient to generate a reasonable doubt of the guilt of the accused sufficient to call for an acquittal.

State v. *McDermott,* 99 W. Va. 220, 128 S. E. 108;

State v. *Brown,* 107 W. Va. 60, 63, 146 S. E. 887.

duced and examined at length as a witness on behalf of the Board (Tr. 330 et seq.). He was the sole witness used by the Board's counsel to testify as to the facts surrounding the organization and incorporation of Local 1, and also as to the procedure following in procuring its recognition for bargaining purposes and the manner in which this union has in practice since functioned.

This witness stated unequivocally that prior to its formation there was no discussion of the formation of an independent union with any of Petitioner's management (Tr. 423). His testimony stands unimpeached.

The Examiner's Report declares that before the plant shut down for the second time on March 28, 1940, the 15 or 20 employees in the decorating department who had returned to work (none of whom quit work at or after the date of the second shut-down) discussed among themselves during the lunch hour the advisability of having some sort of an organization to represent them (Exam. Rep. 8). The testimony discloses,—and the Report is not at odds therewith,—that on April 6 or 7, 1940, Local 1 (the independent union) had presented to Petitioner the original draft of a proposed working agreement (Tr. 444). It was retained by Petitioner for about two days, at the end of which time it was returned with certain penciled interlineations thereon embodying minor changes therein suggested by Petitioner (Tr. 448-450). The agreement, as modified, was not finally approved by the workers until some time between April 15 and 25, 1940. (Tr. 454.) About April 23, 1940, it was resubmitted to Petitioner in revised form (Tr. 455; Ex. 9), and it was not until April 29, 1940, that it was accepted by Petitioner and the latter recognized Local 1 as sole bargaining agent for the decorating department (Exs. 5 and 9). An entire absence of collusion or inordinate haste on the part of Petitioner is thus apparent.

The Report further alleges that when on April 6, 1940, Coslick presented to Petitioner's Secretary the preliminary draft of the proposed working agreement for the employees in the decorating department, Petitioner did not then demand proof of the organization's representation for the decorators, and that subsequently such proof was not demanded (Exam. Rep. 8). Coincident with the delivery of this document Coslick assured Secretary Weber, Jr., that the union then in process of organization represented all the employees in the decorating department (Tr. 448). Furthermore, the written request for recognition of Local 1 was authenticated by the signatures of a committee of five from the department in which it was organized. (Ex. 9.)

Formation of Branch 1.

As to the manner in which Branch 1 of the Independent was conceived and organized and has functioned, Victor Melphis testified at length on the Board's behalf.

According to the Report, a group of workers headed by Melphis returned to work under the reduced wage scale March 12, 1940. Melphis' statement is that they returned to work "around the 23rd of March," 1940 (Tr. 617). The evidence of Melphis shows that the latter part of May or first of June, 1940, about 20 of the skilled workers in the hot metal department got together in the Petitioner's blowing-room and appointed "a committee to contact local 1 of the union * * * in the decorating shop" (Tr. 635).

Various meetings were held for the purpose of drafting by-laws of the last two of which one was held at the home of Melphis and another in the basement at the home of Charlie Ott (Tr. 638, 644, 647-649). Previously Attorney Charles N. Bland, of Weston, had been consulted by and had advised a committee of the workers designated to con-

fer with him (Tr. 649). After the by-laws had been placed in tentative form, the proposed by-laws were submitted to Frank Coslick, Chairman of Local 1, "to let him see what he thought of them." That "was between the 4th of June and the 17th," and Coslick thought they were all right (Tr. 651), whereupon they made written application under date of June 4, 1940, to Local 1 for admission into that union (Tr. 652; Ex. 12), and in reply thereto received a notice dated on June 17, 1940 (Tr. 652; Ex. 13), admitting the skilled workers in the hot metal department into Local 1 as Branch 1 thereof.

On the same day or shortly thereafter Melphis presented to Petitioner's Secretary a written request for the recognition of Branch 1, as the sole bargaining unit of the skilled workers in the hot metal department (Tr. 659-660; Ex. 22). Some time "the following week," Weber, Jr., handed Melphis a letter from Petitioner recognizing Branch 1, as the "sole collective bargaining organization in the Hot Metal Department" (Tr. 662; Ex. 23). A check-off system was provided for and the Petitioner notified thereof (Tr. 667; Ex. 24). In the hot metal department, there is a one hundred per cent affiliation with Branch 1 by the employees (Tr. 680).

Formation of Branch 2.

As stipulated (Ex. 25), Mrs. M. Smith, had she been interrogated, would have testified to the effect that "When the female employees in the Finishing Department returned to work shortly after May 15, 1940, a group of them, including Mrs. Smith, discussed, informally, the question of the organization of an Independent Union whenever they happened to meet. These discussions continued intermittently for about a week." An initial meeting was held in the Finishing Department after working hours on

May 22, 1940, with practically all employees in attendance. Decision to organize was reached and Mrs Smith named as President. She thereupon appointed a committee for the purpose of getting the organization started. This committee sought the advice of DaCosta Smith, an attorney of Weston. With the working agreement between Local 1 and Petitioner as a guide, Mrs. Smith drafted a working agreement for her group in which appropriate departures from the other agreement were embodied.

This rought draft was submitted to Attorney Smith for recasting and about three days after it came back from him in form as he had revised it, it was submitted to John Weber, Jr., who made a brief comment favorable to the idea of an organization by the miscellaneous workers and a working agreement with such organization.

On June 29, 1940, Branch 2, as it had been designated, was admitted into Local 1 with which it is still affiliated.

On August 16, 1940, John Weber, Jr., delivered to Mrs. Smith a letter of recognition of that date from Petitioner. (Ex. 27). A check off chiefly for sick benefits for the membership of Branch 2 has been authorized and is made regularly, and it remains the recognized bargaining unit for its membership.

A reading of the Report discloses that the Trial Examiner concluded that the Petitioner promptly recognized and accepted the plan of each independent union as the working agreement of said organization without any check or inquiry as to majority representation, and upon this and other equally erroneous premises found that the Petitioner dominated and interfered with Local 1 and its two branches. (Exam. Rep. 13). As hereinbefore pointed out this is in the teeth of the uncontradicted testimony of the Board's witnesses, Coslick and Melphis, and the Smith stipulation,

and the Board has vouched for the credibility of all this evidence.

Specification of Error to Be Urged

The lower Court erred in directing enforcement of the order of the National Labor Relations Board of September 12th, 1942, and thereby in effect confirming said order and ratifying in all respects the findings of the Board as set forth in its decision upon which said order was based.

Reasons for Granting the Writ[1]

1. It is urged that when an American tribunal of the undoubted eminence and integrity of the lower Court admits its inability to correct what it conceives to be a palpable injustice perpetrated before its eyes by an administrative agency on a litigant in a case of which such Court has jurisdiction simply because such administrative agency has nominally functioned within a sphere in which it is supposed to be supreme, an important question of federal law is presented which should be considered and settled by this Court.

2. Although not challenging but tacitly conceding the merit of Petitioner's contentions before it "that in every instance of conflict the examiner and the Board rejected the testimony of the company's officials who were men of integrity and good repute and accepted the testimony presented by their adversaries; that the testimony was shot through with inconsistencies and improbabilities and

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[1]To avoid the appearance that in its application for writ of certiorari Petitioner leans heavily on issues purely factual, there is purposely omitted from the discussion under this heading reference to certain of the points above set forth under the heading Action of Lower Court on Questions Presented.

lacked corroboration which must have been available if the testimony were true," the lower Court took the position that such arguments might be persuasive if it "were considering the evidence in an equity case or the finding of a judge sitting without a jury in a case at law," but that in the circumstances of this case the arguments were unavailing.

This view runs counter to the holdings of this Court in N. L. R. B. v. *Virginia Electric and Power Co.*, 314 U. S. 469, 86 L. ed. 348; *Consolidated Edison Co.* v. N. L. R. B. 305 U. S. 197, 83 L. ed. 126; *Washington V. and M. Coach Co.* v. N. L. R. B., 301 U. S. 142, 147, 81 L. ed. 965.

In *Consolidation Edison Co.* v. N. L. R. B., *supra*, (Headnote 12) this Court enunciated the rule that:

> "The substantial evidence necessary to impart conclusiveness to the findings of the National Labor Relations Board is more than a mere scintilla, and is such evidence as a reasonable mind might accept as adequate to support a conclusion."

The rationale of this Court's decision in N. L. R. B. v. *Indiana and Michigan Electric Co.*, decided January 18, 1943, 87 L. ed. 355, is in conflict with the lower Court's holding here. In that case it is held that:

> "The finality accorded to findings of the National Labor Relations Board in an enforcement proceeding before the Circuit Court of Appeals does not preclude that court from considering *whether a party before the Board has had a fair hearing*, including the right to produce evidence or conduct a cross-examination material to the issues before the Board." (Italics ours)

In the same case this Court's further pronouncement is that:

"Findings of the National Labor Relations Board cannot be said to have been fairly reached by it unless material evidence which might impeach, as well as that which will support, the findings is heard and weighed by it."

On this point, the following cases are germane:

N. L. R. B. v. *A. S. Abell Co.* (C.C.A. 4) 97 F. 2d 951;

N. L. R. B. v. *Bell Oil and Gas Co.* (C.C.A. 5) 98 F. 2d 406, 870;

Appalachian Elec. Power Co. v. N. L. R. B. (CCA.4) 93 F. 2d 985.

Unlike N. L. R. B. v. *Nevada Consol. Copper Corp.*, 316 U. S. 105, 86 L. ed 1305, this is not a case in which either of two inconsistent inferences might have been drawn from the evidence.

Absence of Persuasive Effect of Utterances of Petitioner's Officials.

Much evidence was adduced by the Board at the hearing in an effort to prove utterances by Petitioner's officials hostile to the Flints and suggestive of plans running counter to Flint policies for reopening Petitioner's plant, and in arriving at its conclusions the Board placed great reliance on the utterances attributed to Petitioner's officials by those witnesses with Flint affiliations, and completely disregarded direct denials by Petitioner's officials. In this particular the case here presented is similar factually to the case of N. L. R. B. v. *Virginia Electric and Power Co., supra,* in which this Court said:

"The National Labor Relations Act does not preclude an employer from expressing its views on labor policies or problems so long as such utterances do not

by reason of other circumstances, have a coercive effect upon employees in the choice of a representative for the purpose of collective bargaining."

Similarly in N. L. R. B. v. *Ford Motor Co.* (C.C.A. 6) 114 F. 2d 905, Syl. 13-18, it was declared that:

"The constitutional right of free speech in regard to labor matters is as clearly a right of employers as the employees, and if the National Labor Relations Act purported to take away the right, the act could not stand."

In accord:

N. L. R. B. v. *Union Pacific Stages* (C.C.A. 9) 99 F. 2d 153, 178;

Midland Steel Products Co. v. N. L. R. B. (C.C.A. 6) 113 F. 2d 800, 804.

Support of Social Activities.

As part of the general setting of the case against Petitioner it was concluded by the Board, and the lower Court accepted the conclusion, that Petitioner "gave its aid and support to the Independent in its social activities for the entertainment of the workers."

The evidence on this subject was confined to a showing that Petitioner loaned the use of its truck and some benches and tables from its plant for employee outings on two occasions in 1941; and that on another occasion certain of Petitioner's officials were invited to an evening road house party of employees at which one of the officials paid for a round of refreshments after the funds provided by the employees to meet the expenses had been exhausted.

It was submitted that such a showing lacks substantiality within the contemplation of the statute and the holdings construing same and that it lacks probative value sufficient to amount to a circumstance to be considered in connection with other circumstances in arriving at a conclusion against Petitioner.

Failure of Working Agreements to Regulate Wages.

Due to the modern trend toward an indulgence of strikes and toward sanction of other coercive measures commonly resorted to by workers to compel wage readjustments regardless of existing contractual obligations, and due also to the fact that there was an actual acceptance by the employees of the wage scale proposed by Petitioner, no occasion existed for negotiating further wage agreements. An "at-will" contractural arrangement may be said to have been inaugurated and to have since uninterruptedly prevailed.

"* * * * * For the purpose of the Act, it is immaterial that employment is at will and terminable at any time by either party. *A large part of all industrial employment is of this nature. For illustration, factory workers are customarily employed at will, without obligation of employer or employed to continue the relationship when the day's work is done;* or, if there is an agreement fixing salary or wages per unit of service, at so much per day, week or month, there may be an indefinite employment terminable by either party at the end of any unit period. * * * * *." (Italics ours). From Op. of Black, Justice, in N. L. R. B. v. *Waterman S. S. Corp.*, 309 U. S. 206, 84 L. ed. 704, 712.

Board Sponsorship of Flints' Charge.

Admittedly the Board's complaint was patterned after and meticulously followed the Flints' Second Amended

Charge, and in ostensibly seeking to sustain its complaint the Board in fact became the aggressive sponsor of the Flints' cause. The dangers inherent in such procedure were forcefully summarized in the opinion in *Southern Ass'n of Bell Telephone Employees* v. N. L. R. B. (C.C.A. 5), 129 F. 2d 410:

> "* * * We and other courts have pointed out the dangers to the guaranteed rights of employees inherent in a procedure which permits one of the organizations striving for the mastery over the other, to obtain the sponsorship of the Board and enlist it as accuser to, in effect, prosecute another organization before the Board as judge. And we and other courts have made it clear that in its capacity as accuser the Board under the genius of our institutions is held to the same burdens and obligations of proof as any other litigant who takes the affirmative. It may not, by accusing, oust the accused upon proof. As accuser it must prove its charge. In its capacity as a trier of facts the Board stands on the footing of a jury. Like a jury it must be impartial. Like a jury it may not make findings without evidence to support them, and as in the case of a jury it is for the courts to say whether there is or is not evidence in support."

Failure of Board to Produce or Satisfactorily Excuse Non-Production of Important Available Witnesses.

It is an ancient and well-recognized rule of evidence that where a litigant bearing the burden of proof fails to produce and does not explain the non-production of witnesses in support of his contentions, the presumption arises that, if called, such witnesses would testify contrary to such litigant's contentions.

On this point the cases cited below are apposite:

Workman v. *Clear Fork Lumber Co.*, 111 W. Va. 496, 163 S. E. 14;

Miller v. *Miller,* 111 W. Va. 338, 161 S. E. 566;

Mohr v. *Mohr,* 119 W. Va. 253, 193 S. E. 121;

Thompson v. *Beasley,* 107 W. Va. 75, 146 S. E. 885.

Armstrong, Dutton and Jakeway may be said to have been the Board's key witnesses on a number of the main questions at issue. Their statements were met by denials from Petitioner's officials, and in the case of Dutton and Armstrong, their testimony was wholly out of keeping with the testimony previously given by them before an Examiner for the Board of Review of the West Virginia State Unemployment Commission. Other persons with Flint predilections participated in the proceedings concerning which Armstrong and Dutton undertook to testify. Such available witnesses were not called nor was their absence accounted for.

Mass Rejection of Testimony of Petitioner's Officials.

In every instance where there was a conflict between the testimony of Petitioner officials and that of Board witnesses, the Examiner rejected the testimony of Petitioner officials assigning as a reason for such dubious course that he was not impressed with the reliability of such witnesses. The reasoning of the Examiner was in effect approved by the Board and finds unqualified support in the lower Court's decision.

The provision of the National Labor Relations Act to the effect that the findings of the Board if supported by evidence shall be conclusive does not compel acceptance by the court of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence. N. L. R. B. v. *Union Pac. Stages, supra.*

Weight Accorded Evidence Taken by Board.

While in effect admitting the inadequacy of the proof before the Board to sustain certain of the Board's findings, the lower Court refrained from disturbing such findings on the theory that it was beyond its "power to resolve conflicts in the evidence or even to inquire whether the findings of the Board are so clearly erroneous that an injustice has been done."

In support of this anomalous doctrine the lower Court cites, quotes from and relies upon N. L. R. B. v. *Waterman S. S. Corp., supra.*

The facts in that case are in no sense comparable to the facts in this case. The *Waterman Steamship Corporation* case involved a jurisdictional dispute between two major nationally organized labor unions and it was manifest from the evidence that the Corporation exerted powerful pressure by way of wholesale discharges of ship crews to compel A. F. of L. affiliation rather than C. I. O. affiliation. In the instant case, not a single individual was deprived of employment by reason of union or non-union affiliations. The facts developed by the evidence in the *Waterman Steamship Corporation* case were certainly established by a plain preponderance of the evidence. Here it is said that by mere suggestions or by derogatory remarks concededly falling on deaf ears and heeded by none to whom they were addressed, Petitioner's officials indicated a predilection against the Flints. At no stage of the negotiations which preceded their strike did the Flints definitely promise any concession as to wages which might have enabled Petitioner to reopen and operate its plant. The only proposals forthcoming from them contemplated continued unalterable adherence to the wage

scale and other working conditions theretofore prevailing. In short, although the Flints invited repeated conferences between their representatives and Petitioner representatives the former entered such conferences resolved to remain unyielding and because Petitioner officials may at times have displayed mild exasperation at this attitude of the Flints, the latter contend that this is irrefutable evidence that the Petitioner was anti-Flint and pro-Independent. The Board gave ready acceptance to this view. Such a conclusion is not sustained by the Petitioner's labor relations background which reveals an unbroken record of open and fair dealing with the Flints extending over a period of many years.

Conclusion

For the foregoing and other errors to the prejudice of Petitioner appearing upon the face of the record of said proceeding, your Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

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